Supreme Court, U.S.
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No. 99-1519

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JOE BAILEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

ARGUMENT

1. Respondents agree that the decision of the West Virginia Supreme Court of Appeals pits a claim brought under the state's Human Rights Act, W.Va. Code §§5-11-1 *et seq.*, against the arbitration scheme of the Railway Labor Act, 45 U.S.C. §153. Respondents agree that the decision holds that the federal scheme is subordinate to the state law claim. They defend this as the correct result.

Respondents are faithful to the errors of the Supreme Court of Appeals. They do not account for the decision of the Fifth Circuit with which the decision of the West Virginia court is in direct conflict, *Owens v. Texaco, Inc.*, 857 F.2d 262, 264-65 (5th Cir. 1988) (federal labor law dictates that an arbitrator's interpretation of the "contract status of the parties is controlling" in trial of a discrimination claim). Nor do respondents confront our showing that the West Virginia court was wrong in concluding that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), encompasses this case. Respondents embrace the Supreme Court of Appeals' holding that the Railroad committed intentional age discrimination when (in the court's view) it chose to apply one of two available rules to rank respondents on the conductor roster: the rule in the 1954 labor agreement, which caused respondents to be placed at the bottom of the roster, instead of the rule in the 1988 agreement applicable to the more junior trainmen, who were always subject to a requirement that they accept promotion to conductor.

That holding runs roughshod over the Railway Labor Act arbitration board's award. The award establishes that the Railroad had no choice as to where to rank respondents, because the 1954 agreement exclusively governed the matter

of assigning conductor seniority to employees hired before November 1, 1985, *including* employees like respondents who had been forced to become conductors under the 1991 national agreement. The 1954 agreement dictated placement of respondents at the bottom of the conductor roster.[1]

The Supreme Court of Appeals refused to give force to the arbitration award. The effect was to permit the Railroad to be found liable under state law for doing exactly what the arbitration board had ruled it was required to do under a labor agreement with which the Railroad had to comply as a matter of federal law, 45 U.S.C. §152, First, and that respondents did not challenge as discriminatory.

2. What respondents affirmatively say about the role of federal law in consideration of their HRA claim confirms why it is necessary for this Court to state what the rules are. Echoing the West Virginia court, respondents assert that, because the HRA is an independent source of rights, the arbitration board's determination of the rights of the Railroad and respondents under the controlling labor agreement is irrelevant to the question of liability under the HRA.

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[1] Respondents suggest (Brief in Opp. at 3-4) that the award did not find that the 1954 agreement required this treatment of their seniority. This is an empty assertion. The question put to the arbitration board was whether the Railroad's placement of the newly promoted pre-November 1, 1985 trainmen at the bottom of the conductor roster was in accordance with the governing labor agreement. The board held that it was. No one ever suggested there was any other option available under that agreement. To the contrary, the arbitration case and the resulting award proceeded on the understanding that placement at the bottom was the only method that comported with the 1954 agreement rule. See App. 83a-84a; Defendant's Trial Exh. 20 (carrier's arbitration brief); Defendant's Trial Exh. 21 (union's arbitration brief).

No one questions that the HRA is an independent source of substantive rights or contends that the RLA preempts discrimination claims as a class. But an employee's assertion of rights under a state discrimination statute is merely the starting point for the analysis. The Court made clear in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988), and *Hawaiian Airlines v. Norris*, 512 U.S. 246, 261 (1994), that, even when the rights claimed by an employee derive from state law, the claim cannot go forward when its resolution depends on interpretation of a labor agreement, for that interpretation may be obtained only in arbitration.

Here, when suit was brought, there was no unresolved issue of contract interpretation requiring arbitration. Instead, the issue presented is what must happen when the parties' contractual rights and obligations are known, because they already have been definitively interpreted by a labor arbitrator. The principles informing the *Lingle* and *Hawaiian Airlines* preemption analysis compel deference to the outcome of the completed arbitration process in a subsequent state action and bar a court from upholding a state claim that conflicts with the arbitrator's interpretation of the "contract status of the parties," *Owens*, 857 F.2d at 264.

In a case like this one, what the federal labor arbitrator says is critical to the evaluation of rights under state law. The labor agreement here is the measure of whether respondents have been denied an employment benefit at all. The labor agreement defines the conductor seniority to which respondents are entitled, just as it defines the conductor seniority it is permissible for the Railroad to give. Arbitrators are the expert judges of what labor agreements provide. The arbitration board's ruling establishes that respondents were given all the conductor seniority that they are owed and that the Railroad would have violated the contractual rights of other employees if respondents had been treated more

favorably. So, when respondents assert (Brief in Opp. at 4) that "the men's substantive rights under West Virginia law did not depend on what the arbitrator decided," they are just advocating the same primacy of state law over the federal labor scheme that pervades the decision of the West Virginia Supreme Court of Appeals.

Of course, as respondents observe (Brief in Opp. at 7, 8), a railroad and union cannot contract to discriminate with impunity. But that principle has nothing to do with this case or with the issue presented in the petition. As the Supreme Court of Appeals made clear, respondents did not challenge the Railroad's labor agreements as discriminatory. App. 20a & n.12. The West Virginia court did not find it was discriminatory for the 1954 and 1988 agreements to provide different conductor seniority rules applicable to mutually exclusive groups of employees defined by the employees' dates of hire, *not* their ages. Rather, the court found that the assertedly discriminatory act was the Railroad's supposed decision to apply one of the rules (that in the 1954 agreement), rather than the other, to respondents. App. 27a.[2]

3. The rest of the Brief in Opposition is a diversion, serving only to demonstrate the license given to respondents in arguing their case at trial. The points respondents seek to make did not impress the Supreme Court of Appeals and did not inform that court's judgment. These matters do not contribute to the analysis of the issue of federal law that warrants

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[2] Respondents certainly cannot defend the court's decision by asserting (Brief in Opp. at 19), contrary to the court's findings, that labor agreement rules negotiated by the Railroad and the United Transportation Union in 1954 and 1988—what respondents call "the two-track system"—were rules the Railroad unilaterally "put in place" after November 1991.

review by this Court, and do not bear on the decision this Court should make.

Respondents suggest at one point (Brief in Opp. at 10) that their claims were not limited to the Railroad's placement of them on the conductor roster. But the Supreme Court of Appeals explicitly found that the only act of discrimination for which the Railroad was held liable was its having "placed [re-pondents] at the bottom of the conductors' seniority roster" upon requiring them to accept promotion. App. 6a. The promotion requirement itself was "not challenged," App. 20a n.11, and respondents, admitting they did not challenge it, characterize the requirement as a "federal mandate," Brief in Opp. at 18-19.

Viewed most generously, the Brief in Opposition is a catalog of supposed occurrences that assertedly speak to the Railroad's discriminatory motive when placing respondents on the conductor roster. What the evidence actually showed was that the Railroad valued these employees' knowledge and experience and wanted to retain them; the Railroad was not happy at the thought that its more experienced trainmen might be inconvenienced by their low placement on the conductor seniority roster. Trial Tr. 408, 706-08, 723-24. But it would not matter if the Railroad did actually possess age-based animus. Impermissible motive alone is not actionable discrimination; there must be a discriminatory act caused by the supposed animus. *See generally Price Waterhouse v. Hopkins*, 490 U.S. 228, 262 (1989) (O'Connor, J., concurring).

The arbitration board's ruling that the 1954 agreement covered respondents and dictated the seniority placement they received establishes, as a matter of law, that there was no discriminatory act here. The Railroad was obligated under the RLA to apply the 1954 agreement, and only that agreement, in assigning conductor seniority to respondents;

the Railroad simply had no choice. Even if the Railroad had a proscribed motive when giving respondents the seniority dictated by their labor agreement (and it did not), the Railroad's action would not be any less lawful. Had the arbitration award been given the binding effect required by federal law, the case would never have gone to the jury.

That said, we must add, because no litigant could allow irresponsible allegations like those lodged by respondents to stand unrefuted, that: (1) the Railroad did not insist that union representatives submit to placement of the trainmen newly promoted under the 1991 national agreement at the bottom of the pertinent conductor roster;[3] (2) the Railroad did not discriminate against respondents when it inadvertently put other employees out of place on the conductor roster for a short period of time;[4] (3) the Railroad did not target older

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[3] The Railroad would have been open to other alternatives, but the UTU negotiators made clear that *the union* would not agree to anything that would "result in current conductors being run around by any newly-promoted [trainmen]." Trial Tr. 392. Accordingly, the Railroad negotiated new agreements for other parts of its railroad system that, consistently with the union's fixed position, called for placement of the newly promoted pre-November 1, 1985 trainmen at the bottom of the pertinent conductor roster. Trial Tr. 389, 392, 616-23; Defendant's Trial Exhs. 13, 14. The UTU general chairman for respondents' particular territory declined to enter into a similar agreement and did not propose any other terms. Trial Tr. 592, 624-25. Therefore, respondents' conductor seniority continued to be governed by the pre-existing 1954 agreement.

[4] Of the Railroad's 3,787 trainmen who were promoted to conductor in the years after adoption of the 1991 national agreement, 28 were inadvertently misplaced on the pertinent conductor seniority roster, including 25 on respondents' territory. Those 25 trainmen, who were hired after November 1, 1985, and promoted to conductor after respondents, were temporarily placed ahead of respondents on the conductor roster. When the Railroad discovered this

employees for elimination;[5] (4) the Railroad did not file a false declaration in federal district court.[6]

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mistake during a review of the seniority rosters occasioned by this civil action, the Railroad corrected it and returned the 25 employees to their proper places on the roster—behind respondents. During the entire episode, no employee filed a claim under any labor agreement alleging improper placement on the conductor roster. Trial Tr. 422-32, 539-40; Defendant's Trial Exh. 47.

[5] No one was eliminated; neither respondents nor any other employees were laid off or forced to give up their jobs. Respondents are referring to the Railroad's having made an offer of $50,000 to its employees who would *voluntarily* resign—an offer each employee was free to accept or reject, as all the respondents did. Moreover, in a three-month period between November 1991 and February 1992, the Railroad made voluntary separation available to *all* trainmen on the entire Norfolk Southern system, without regard to their ages. Trial Tr. 566-69, 664-68; Plaintiffs' Trial Exh. 6; Defendant's Trial Exh. 43.

Nor did the Railroad couple an "announcement" as to where the newly promoted pre-November 1, 1985 trainmen would be ranked with a voluntary separation program. There was no announcement. Respondents are referring to an internal management letter from the Labor Relations Department to the superintendents of certain of the Railroad's operating divisions. The letter was not meant for or provided to employees or intended to influence them to accept voluntary separation. It was withdrawn by a superseding instruction letter and never had any effect. Trial Tr. 416-21; Plaintiff's Trial Exh. 8; Defendant's Trial Exh. 23.

[6] The declaration in question was filed in the United States District Court for the Southern District of West Virginia in connection with respondents' motion to remand. It stated that the pre-November 1, 1985 trainmen who were required to become conductors in 1992 had been correctly ranked pursuant to the 1954 agreement. That was true then and is still true. It also stated that trainmen hired on or after November 1, 1985, were promoted as provided in the 1988

We reiterate: these insupportable allegations have nothing to do with the issue of law presented by the petition for certiorari. The Court need not pay attention to these allegations (and others like them). This case can and should be decided without regard to them.

4. The Supreme Court of Appeals' decision strikes at the core of our federal system of industrial self-management and the arbitration of contract disputes that is central to that system. Employees, unions, and employers alike all depend on the stability provided by this arrangement—in industries governed by the Labor Management Relations Act no less than in those governed by the RLA. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 217-19 (1985); *Union Pacific Ry. v. Sheehan*, 439 U.S. 89, 94 (1978) (per curiam).

A regime governed by the rule adopted by the West Virginia court threatens to bring havoc to this system, as an arbitrator's determination of the parties' labor agreement rights would no longer be final and binding once an employee asserts a claim under an independent state (or federal) discrimination statute. Permitting a jury to reach a result that contradicts a labor arbitrator's determination of rights conferred by a labor agreement that is *not challenged* as discriminatory would have disastrous consequences for

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labor agreement that applies to them; that was also true then and is still true. The declaration made no representations inconsistent with the fact, discovered only later, that 25 employees were mistakenly placed ahead of respondents on the conductor roster (see note 4, above). Respondents' baseless attack on the declaration was thoroughly ventilated in the state trial court, Trial Tr. 460-63; the document was not admitted into evidence there, *id.* 464-65; and the Supreme Court of Appeals rightly paid no attention to the matter in its decision.

employees as well as employers. Virtually all the terms and conditions of employment of unionized employees are fixed by labor agreements. Labor agreements prescribe, among other things, how much employees are paid, how they obtain job assignments or promotions, the order in which they are laid off, and what rights they have to particular types of work. Labor agreements protect employees in a particular craft (say, clerical employees) from having their work taken by employees in another craft (say, electricians). Labor agreements protect employees in a particular plant from having their work taken by employees in a different plant.

It is critical to the effective enforcement of these agreement protections that disputes over their interpretation be resolved exclusively in arbitration. The uniformity the arbitral system generates ensures that each side can be "certain of the rights which it has obtained or conceded." *Teamsters v. Lucas Flour, Inc.*, 369 U.S. 95, 103-04 (1962). The system would not function if a jury could decide, for example, that despite a labor arbitrator's determination that an employer properly assigned work to employees in a particular craft, the employer's failure to depart from its agreement in order to give the work to employees in another craft created liability under state law. But that is exactly the outcome the West Virginia court's decision would allow.

By creating a parallel regime in which a labor arbitrator's contractual determinations are not binding in the face of a claim asserted under state law, the Supreme Court of Appeals' decision wrongly elevates state discrimination law over the federal labor law scheme. Under the rule adopted by the West Virginia court, an employer (or union) can be found liable under state law for honoring its federal law duty to comply with its labor agreement, even though the labor agreement is not found to be discriminatory under state law.

This Court, consistently with Congress' intent, should reaffirm the finality and significance of the outcomes of labor arbitrations and encourage the resolution of contract disputes through this scheme. The Court should make clear that labor arbitration awards are to be given preclusive effect in the areas they cover, and that such awards bar a state court from allowing state claims that contradict the arbitrator's determination of the parties' contract status.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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